BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANAB HASSAN	)	
Claimant	)	
v.	)	
	)	Docket No. 1,062,808
TYSON FRESH MEATS, INC.	)	
Respondent and Self-Insured	)	

ORDER

Claimant requests review of the September 7, 2015, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on January 14, 2016.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for claimant. Randall W. Schroer, of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ denied compensation, finding claimant did not serve respondent with timely written claim, as required by K.S.A. 44-520a (Furse 2000),[1] and did not timely file her application for hearing, pursuant to K.S.A. 44-534(b) (Furse 2000). The ALJ did not rule on the nature and extent of claimant's disability and whether she is entitled to unauthorized or future medical treatment.

Claimant contends that after her February 16, 2009, work injuries, she did not sustain subsequent injuries by repetitive trauma, despite evidence offered by respondent to the contrary. Claimant argues she continuously requested medical treatment for her February 2009 injuries and served written claim within 200 days after the date she last received authorized treatment. Claimant requests the Board reverse the ALJ's decision.

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[1] The written claim requirement was repealed effective May 15, 2011. This claim is governed by the law in effect when claimant was injured. See K.S.A. 44-505(c); *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

Respondent maintains claimant did not prove her application for hearing was timely filed, and requests the Board affirm the ALJ's decision.

The Board notes it is unclear at best what issues are before the Board – timely written claim, timely application for hearing or both. The regular hearing pretrial stipulations denote only timely written claim, not the timely application for hearing, was raised as a defense. Respondent's submission letter argued only the application for hearing defense, not the written claim issue, although its submission letter stated timely written claim was denied. Claimant's submission letter addressed only the written claim, not the application for hearing. The Award seems to address both defenses. The application for Board review made only a vague reference that the Award was "contrary to the evidence that has been presented and the record." Claimant's Board brief argued the written claim defense, not whether the application for hearing was timely filed. Respondent's Board brief argued the application for hearing defense, not written claim.

Since both defenses seem to have been decided by the ALJ, and because the filing of the application for Board review provides the Board with authority to address any issue raised before the ALJ,[2] the Board will address both defenses.

The issues are:

1. Did claimant serve respondent with timely written claim?

2. Did claimant file a timely application for hearing?

FINDINGS OF FACT

Claimant testified she resided in Garden City, Kansas, never attended school, and did not speak, read or write English. She spoke Somalian, but could not read or write that language. According to claimant, she had no "special job skills."[3]

On February 16, 2009, claimant was injured when she fell after stepping on fat on the floor, landing on her back. She testified she immediately experienced pain in her whole body, specifically including her neck, head, shoulders, back, and right leg, foot and ankle. Respondent stipulated claimant sustained personal injury by accident arising out of and in the course of her employment.

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[2] See K.S.A. 2008 Supp. 44-555c(a).

[3] R.H. Trans. at 11.

Claimant was sent to St. Catherine Hospital on February 17 and February 20, 2009. Claimant testified she saw Dr. Hunsberger twice in 2009 and did not see a doctor for "quite some time" thereafter.[4] Claimant gave birth to a child on June 29, 2009, and was off work for 45 days. Claimant testified that she returned to her regular job, but she still had pain due to her February 16, 2009, accidental injury and she asked for additional medical treatment "every day two times."[5] She testified that upon her return to work, she repeatedly asked for medical treatment at the nurse's station and was sent to a doctor "almost a year after."[6] Claimant testified she saw Drs. Hunsberger and Baughman four to six weeks after her return to work, which actually would have been in September or October 2009.

On November 9, 2009, respondent had claimant sign two documents: an "Occupational Health Services Department Health Information Request"[7] and an "Authorization For Release of Protected Health Information For Job Injury Claim." The latter document stated the purpose of disclosure was for a "Job Injury Claim."[8] At the time these documents were prepared, claimant was seeking medical treatment and she was provided treatment. Respondent prepared a form stating claimant's injuries were due to repetitive motion. Respondent noted claimant's injury date was November 9, 2009.[9]

Dr. Hunsberger examined claimant on December 15, 2009, for what respondent characterized as a November 9, 2009 date of accident by repetitive trauma. Claimant would have seen Dr. Hunsberger before December 15, 2009, because the doctor's notes refer to claimant still having symptoms after taking medication. Dr. Hunsberger released claimant at MMI.

According to claimant, an interpreter was present at some of her visits to the nurse's station. When there was no translator, claimant testified she tried to understand and communicate. When claimant saw the nurse at respondent's medical clinic, claimant said what her symptoms were and someone[10] wrote something on papers. Claimant could not read or write, but she knew something was written on the papers. The content of the

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[4] R.H. Trans. at 26.

[5] Claimant's Depo. at 6.

[6] R.H. Trans. at 15.

[7] Claimant's Depo., Ex. 1 at 5.

[8] Aguilar Depo. (Sept. 1, 2015), Ex. 1 at 6.

[9] Claimant's Depo., Ex. 1 at 4.

[10] The identity of this person is unclear.

paperwork was not explained to claimant. She testified she was asked to sign the papers and she apparently did so.[11]

Claimant testified her pain worsened at times as she continued working for respondent, and that is when she would report to the nurse's station, requesting she be sent to a doctor. According to claimant, after almost a year, respondent sent her to Drs. Hunsberger, Baughman and Woodward.[12] Claimant testified the treatment she received was for her 2009 injuries. Claimant asserted she told no doctors she was injured by repetitive work.

On September 27, 2011, respondent had claimant sign an Injury/Illness report stating claimant had a September 6, 2011, work-related injury from repetitive motion.[13]

Claimant testified she was eventually sent to Dr. Hunsberger on October 6, 2011, but no translator was present.[14] Claimant testified she saw Dr. Hunsberger for the effects of her 2009 fall. According to claimant, the doctor asked her a number of questions, to which she did not respond because she and the doctor "didn't have good communication."[15] Claimant asserted she told Dr. Hunsberger about her 2009 fall, but said nothing about any injuries from repetitive work. Claimant testified she received treatment, consisting of "painkillers"[16] and physical therapy, neither of which helped.

At some point following claimant's visit(s)[17] with Dr. Hunsberger in 2011, "they" told claimant her "case was closed,"[18] and denied her request for additional treatment at some time. However, respondent last provided medical treatment for claimant on what respondent viewed as a 2011 injury on December 3, 2012.

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[11] See Aguilar Depo. (Sept. 1, 2015), Ex. 1.

[12] The record does not contain any records from Drs. Baughman and Woodward, and only two chart entries of Dr. Hunsberger, dated December 15, 2009, and December 21, 2011. R.H. Trans., Cl. Ex. 2; Worthley Depo. (July 22, 2015), Cl. Ex. 1.

[13] Claimant's Depo., Ex. 1 at 1.

[14] Claimant's testimony is unclear whether the appointment with Dr. Hunsberger was an initial visit or a return visit. R.H. Trans. at 15.

[15] R.H. Trans. at 16.

[16] *Id.* at 17.

[17] It is unclear how many times claimant saw Dr. Hunsberger in 2011.

[18] *Id.* at 23-24.

Claimant testified she reported no new injuries after her February 2009 accident. Specifically, claimant denied reporting new injuries on November 9, 2009, and September 6, 2011.[19] According to claimant, she told respondent she still had pain from the 2009 fall. Claimant testified emphatically that the only injuries she sustained while working for respondent was in February 2009.[20] Claimant denied filling out any injury reports, other than the one for the 2009 accidental injuries.

Claimant experienced pain from the 2009 injuries to the present date. Claimant testified she had pain in both shoulders, neck, back and right hand. She testified she continued to work for respondent without restrictions until her employment was terminated on September 30, 2013.

Kelly Worthley, respondent's workers compensation administrator, testified she investigated and handled injuries reported to respondent, paid medical bills, documented medical records, determined compensability and took care of settlements. She explained in some detail how respondent's system operated when new injuries were reported.

Respondent's records contained computer generated accident reports indicating claimant reported injuries on November 9, 2009 and September 6, 2011. Ms. Worthley insisted claimant's visit with Dr. Steffen on December 3, 2012, and paid for by respondent on January 8, 2013, related to repetitive work injuries sustained by claimant after the accident on February 16, 2009.[21] Dr. Steffen's records of December 3, 2012, stated claimant "has struggled with bilateral shoulders, neck, back, arm and hand pain," but records only an accident in 2008.[22]

Ida Aguilar testified she was a nurse manager in respondent's occupational health services department. She identified two of respondent's Injury/Illness Information reports, both of which were signed by claimant, but were not filled out by her. The first concerns a September 6, 2011, illness by repetitive motion.[23] The other concerns a November 9,

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[19] At the regular hearing, respondent offered a number of Employer's Report of Accident forms that were filed with the Division. Among those reports were two specifically relied on by Respondent: (1) accident date, November 9, 2009, upper extremity injuries by repetitive motion (R.H. Trans. Resp. Ex. 1 at 3), and (2) accident date, September 6, 2011, injury to "multiple body parts," by repetitive motion (R.H. Trans. Resp. Ex. 1 at 5). There is no evidence claimant filled out or signed any of the reports.

[20] Claimant has two other docket claims for 2013 injuries, neither of which is material to this claim.

[21] Worthy Depo. (July 22, 2015) Resp. Ex. 2 at 4.

[22] *Id.*, Resp. Ex. 3 at 1.

[23] Aguilar Depo., (Sept. 1, 2015) Ex. 1 at 1.

2009, illness by repetitive motion.[24] Ms. Aguilar did not testify claimant filled out the reports, read them, understood them or had them explained to her.

Terrence Pratt, M.D. evaluated claimant on August 4, 2014, by order of the ALJ. Claimant reported continuous cervical symptoms with sharp electric pain bilaterally radiating into both shoulders. Claimant experienced bilateral upper extremity and cervical weakness. She had continuous sharp bilateral low back pain radiating into the lower extremities, not as severe on the left, and bilateral lower extremity numbness and weakness, primarily on the right.

Dr. Pratt's diagnoses were cervicothoracic discomfort, low back pain, bilateral shoulder syndrome, and diffuse undetermined upper and lower extremity symptoms.

For claimant's February 16, 2009, accident, Dr. Pratt rated claimant at 5 percent whole person impairment for her lumbosacral spine, no impairment for her cervicothoracic spine; 8 percent impairment to the left upper extremity for her left shoulder partial rotator cuff tear; and no impairment for the right shoulder. Claimant's 8 percent upper extremity impairment converted to a to 5 percent whole person impairment. Combining the 5 percent lumbosacral rating with the 5 percent left shoulder rating totaled a 10 percent whole person permanent impairment of function. Dr. Pratt recommended claimant avoid frequent activities with her left upper extremity, no lifting over 20 pounds and avoid frequent bending or twisting.

According to Dr. Pratt's report, claimant received treatment for her injuries from Dr. Hall from February 17, 2009, to March 30, 2009; from Dr. Baughman from August 6, 2012, until November 1, 2012; from Dr. Hunsberger from February 20, 2009, until July 30, 2013; from Great Bend Hospital on December 3, 2012; and from Accelacare from May 7, 2013, until May 21, 2013.

Dr. Pratt did not identify injuries – traumatic, repetitive, or otherwise – on November 9, 2009 or September 6, 2011.

C. Reiff Brown, M.D., a retired orthopedic surgeon, examined claimant at the request of her counsel on June 12, 2013, and December 19, 2013. Dr. Brown took a history, reviewed medical records and performed a physical examination. Claimant told Dr. Brown about her injury of February 16, 2009, when she fell backwards on a slick floor. Claimant told Dr. Brown she experienced pain from the 2009 injuries to the present date. Claimant said she had pain in both of her shoulders, neck, back and right hand.

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[24] *Id.* Ex. 1 at 4.

For claimant's February 16, 2009, accident, Dr. Brown diagnosed rotator cuff tendinitis and acromial impingement syndrome in her left shoulder, a sprained neck and a lumbar sprain. Dr. Brown testified the February 2009 injuries were repetitive in nature, resulting from work activities.

On cross-examination, claimant's attorney asked Dr. Brown to assume the accuracy of claimant's testimony concerning the February 16, 2009, single traumatic injury. Dr. Brown admitted claimant's injuries could have resulted from the single traumatic event on February 16, 2009, instead of by repetitive trauma.

Dr. Brown reexamined claimant on December 19, 2013. Dr. Brown found claimant sustained a 5 percent whole body impairment for the lumbosacral spine and a 5 percent whole body impairment for the cervical spine. Dr. Brown also rated the right upper extremity at 6 percent impairment and a 4 percent left upper extremity impairment. The doctor combined all impairments to arrive at a 15 percent permanent impairment to the body as a whole, resulting from her February 16, 2009, injury.

Dr. Brown found the following restrictions for claimant: avoid lifting above 20 pounds occasionally, 10 pounds frequently and use proper body mechanics to lift; no lifting from below knuckle level; avoid frequent rotation of lumbar spine greater than 30 degrees; avoid frequent rotation, flexion and extension of the neck greater than 30 degrees; avoid frequent use of the arms above chest level and all lifting above chest level; avoid frequent reaching away from the body more than 18 inches; all lifting close to her body and no lifting with her hands more than 10 inches from the body.

Dr. Brown reviewed a list of work tasks created by Doug Lindahl, a vocational consultant, and opined claimant could not perform three of the four tasks, for a 75 percent task loss. Dr. Brown also reviewed the list of seven work tasks prepared by vocational consultant Steve Benjamin and opined out of the seven work tasks, claimant could perform four, for a 43 percent task loss. The vocational reports were stipulated into evidence.

It is undisputed claimant filed her application for hearing on October 19, 2012.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534(b) (Furse 2000) states:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 44-520a (Furse 2000), provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Board finds claimant served timely written claim and timely filed an application for hearing, and that the claim should be remanded to the ALJ with directions to decide the remaining issues raised by the parties.

The purpose of written claim is to enable the employer to know about the injury in time to investigate it.[25] *Fitzwater*[26] describes the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

In *Ours*,[27] the Kansas Supreme Court held: (1) whether an instrument constitutes a written claim and is timely is primarily a question of fact; (2) a written claim for compensation need not take on any particular form; (3) the written claim need not be signed by claimant; (4) in determining whether or not a written claim was made, a fact finder must examine the various writings and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind; and (5) the fact finder must determine whether claimant had in mind compensation for his injury when the various documents were prepared on his behalf, and did he intend by them to ask his employer to pay compensation?

Written claim must be made within 200 days from the date of accident or within 200 days from the last payment of compensation. The furnishing of medical treatment is

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[25] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[26] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

[27] *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

equivalent to the payment of compensation.[28] Written claim is sufficient if it advises the employer that the injured employee is looking to it for compensation.[29]

Blake[30] states, "At least where the respondents are on notice that the workman is seeking additional treatment on the assumption that he is still covered they are under a positive duty to disabuse him of that assumption if they intend to rely on the 200 day statute." The facts of a case dictate whether a claimant had a reasonable expectation that medical treatment would continue.[31]

The record reflects claimant was injured in February 2009, she was off work for her pregnancy, she returned to work and sought medical treatment for her work injury. Claimant did not report a new series of accidental injuries as a result of repetitive trauma. Rather, she consistently attributed her physical injuries to her 2009 accidental injury and she consistently had an expectation that she would receive medical treatment for her 2009 injury. After persistently requesting additional medical treatment, respondent had claimant sign documents, one of which recognized that she had a job injury claim, and also sent her for treatment with Drs. Hunsberger and Baughman in 2009. Claimant satisfied written claim on November 9, 2009. Respondent never told claimant, prior to that time, that she should not be under the assumption that her expectation for ongoing medical treatment was incorrect.

Respondent argues claimant's medical treatment from November 9, 2009, forward related to intervening accidental injuries caused by repetitive trauma, such that any written claim thereafter is invalid for claimant's February 16, 2009, date of accident. The fallacy in respondent's argument is there is little evidentiary support for the notion that claimant sustained intervening injuries following the February 2009 event. Claimant testified she sustained only one accidental injury, the compensability of which respondent stipulated, in February 2009, and thereafter sustained no other injuries relevant to this claim. Claimant testified she had the same physical complaints from the date of the February 2009

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[28] *Riedel v. Gage Plumbing & Heating Co.*, 202 Kan. 538, 449 P.2d 521 (1969); *Dexter v. Wilde Tool Co.*, 188 Kan. 816, 356 P.2d 1092 (1961).

[29] *Richardson v. National Refining Co.*, 136 Kan. 724, 18 P.2d 131 (1933).

[30] *Blake v. Hutchinson Mfg. Co.*, 213 Kan. 511, 515, 516 P.2d 1008 (1973).

[31] *Shields v. J. E. Dunn Const. Co.*, 24 Kan. App. 2d 382, 946 P.2d 94 (1997).

accident to the present time. Neither Dr. Pratt nor Dr. Brown[32] found claimant sustained any injuries material to this claim, other than those resulting from the 2009 accident.

Respondent points to the accident reports filed with the Division by Respondent and to respondent's internal Injury/Illness reports that contain additional injury dates for what it characterizes as repetitive trauma. However, the filing of accident reports, the completion of the Injury/Illness Information reports by individuals who did not testify, or the assigning of claim numbers by respondent relative to payments of compensation, do not establish the occurrence of subsequent injuries by repetitive trauma. Claimant denied any such additional repetitive trauma injuries and the medical evidence in this record fails to establish claimant was injured by repetitive trauma following the February 2009 accident.

In this matter, claimant sought medical treatment all along for her 2009 accidental injury and respondent knew claimant was still seeking medical treatment, although it mistakenly believed claimant had a new repetitive use injury or injuries. Claimant provided written claim on November 9, 2009.

In like manner, respondent last furnished authorized treatment for the 2009 injury well before the deadline imposed to file an application for hearing pursuant to K.S.A. 44-534 (Furse 2000). Respondent provided treatment for claimant's 2009 injury in the fall of 2011 and even as late as December 3, 2012. While respondent characterizes such treatment as being for a repetitive trauma type injury in 2011, the weight of the evidence establishes claimant's injury occurred in 2009 and there was no new or intervening accidental injury. Claimant's application for hearing was timely filed on October 19, 2012.

CONCLUSIONS

1. Claimant served respondent with timely written claim.

2. Claimant filed a timely application for hearing.

3. The claim is remanded to the ALJ with directions to address the remaining issues: the nature and extent of claimant's disability, and claimant's entitlement, if any, to unauthorized and future medical compensation.

[32] The Board finds unconvincing the testimony of Dr. Brown about whether claimant sustained a single accident or repetitive trauma. The record lacks support for the conclusion claimant sustained repetitive trauma. Dr. Brown himself seemed equivocal about the manner in which claimant was injured, and he contradicted himself on that issue during cross-examination.

AWARD

WHEREFORE, the Board finds claimant timely served a written claim, and timely filed an application for hearing. The Award of Administrative Law Judge Pamela J. Fuller dated September 7, 2015, is reversed and the claim is remanded to the ALJ to address the nature and extent of claimant's disability, and claimant's entitlement, if any, to unauthorized and future medical compensation.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge